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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Annual Assessment of the Status of	)	CS Docket No. 97-141
Competition in the Markets for the	)	
Delivery of Video Programming	)	

REPLY COMMENTS OF
THE NATIONAL CABLE TELEVISION ASSOCIATION

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The National Cable Television Association ("NCTA") hereby submits its reply comments in the above-captioned proceeding on the status of competition in the delivery of video programming.

INTRODUCTION AND SUMMARY

The record in this proceeding shows unequivocally that the multichannel video marketplace is becoming increasingly competitive. Alternatives to cable television -- satellite, telephone companies, MMDS, and SMATV -- have made substantial headway in capturing viewers over the past year; there is no turning back. As demonstrated in our initial comments, cable's share of the multichannel video business dropped from 89% to 87% between September 1996 and May 1997.

- By contrast, DBS has continued to challenge cable with a subscriber growth rate of 84.5% from May 1996 to May 1997 -- nearly 34 times as great as cable's.
- Telephone companies are aggressively pursuing cable franchises in dozens of communities, with more than a million households expected to have access to telephone-provided cable service by the end of the year.

- MMDS and SMATV have gained 27% more subscribers since May 1996.
- Broadcast competition to cable has continued to grow in scope and intensity, with the development of new networks.
- And cable operators are beginning to face competitive video offerings from public utilities, with a major initiative announced in the Washington D.C. area since the comments in this proceeding were filed.[1]

By the end of this year, we estimate that more than 10 million consumers will obtain multichannel video services from one of cable's competitors. This trend will only increase as cable's competitors become more savvy in the marketing, packaging and pricing of their services, and if and when they begin to invest resources in greater product and programming differentiation.

Despite the evidence, cable's competitors complain that the regulatory environment, which has assisted their rapid growth, is not doing enough to guarantee their ascension and cable's decline in the video marketplace. As in past years, they target issues that are the subject of ongoing FCC proceedings (e.g., home wiring). But they devote most of their attention to alleged inadequacies in the program access regime, and these Reply Comments will address these claims. As we pointed out in response to Ameritech's recent petition to impose even heavier program access regulations, these filings, too, are long on "what if's" but short on facts.

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1 "Pepco Plans Phone, Web, Cable Service," *Washington Post*, August 6, 1997.

The 1992 Cable Act program access provisions have served as a fail-safe mechanism to accomplish exactly the result that Congress intended: alternative providers of video programming have access to all of the most widely distributed national cable program networks. Cable's competitors are able to, and do, compete for multichannel television viewers. Indeed, it is irrefutable that cable's competitors are marketing packages of national satellite-delivered cable programming networks -- both vertically and non-vertically integrated -- as well as exclusive sports and big event programs.

Not content with guaranteed access to cable networks that are the four corners of the cable television viewing world, competing MVPDs now want government-mandated access to independent, non-vertically integrated programming when there is no evidence to suggest such marketplace intrusion is necessary. And they want government-mandated access to local terrestrially-delivered programming as well. What they demand from government is nothing less than the complete commoditizing of programming and the repudiation of product exclusivity for anyone but themselves. And they want a free ride on cable's investment and risk-taking in the development of local and regional services.

With no empirical evidence to warrant such intrusion in a robust and thriving video marketplace, cable's competitors argue that recent consolidation of contiguous cable systems and joint ventures in the programming arena somehow threatens their survival. They call for a comprehensive reevaluation of the rules and Congressional action to force every non-broadcast programmer in the United States, cable-affiliated or not, to renounce exclusivity if they wish to sell to cable operators.

These demands should be rejected. First, most of the same companies that attack cable's efforts to compete more efficiently through consolidation in various communities are already telecommunications giants. They have aligned in various consortia and joint ventures of size and scope that dwarf the entire cable industry. And as the past year alone has shown, they are fully capable of competing with incumbent cable operators without further government largesse. Second, the same companies that decry exclusivity for cable -- particularly the RBOCs and DBS providers -- promote the benefits of exclusivity in their own video services.

Just eight months ago in its Third Annual Report, the Commission declined to recommend to Congress that the program access rules be extended to non-vertically integrated programmers. Today the record shows more competition, not less -- and no evidence that the FCC should revise its judgment. There are many sound economic reasons why non-vertically integrated programmers would want to grant exclusivity and they should be allowed to do so. Indeed, as antitrust law and Commission precedent recognize, exclusivity is a normal competitive tool.[2] To the extent individual cases merit Commission attention, the agency has the tools to address these situations, as has already been demonstrated in its complaint process.

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2 See e.g., Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 F.C.C. Rcd 5299,5309-10 (1988), aff'd sub nom. United Video Inc. v. F.C.C., 890 F.2d 1173 (D.C. Cir. 1989). ("Program Exclusivity in Cable and Broadcast Industries").

DISCUSSION

I. PROGRAM ACCESS RULES HAVE ACCOMPLISHED WHAT CONGRESS INTENDED AND SHOULD NOT BE EXTENDED

A. Both Vertically Integrated and Non-Vertically Integrated Cable Networks Are Widely Distributed By Competing MVPDs

The Commission has analyzed program access issues year after year in its Annual Competition Report and provided ongoing oversight through its enforcement process. In every case, the Commission has found that the rules have been successful in promoting competition by providing access to vertically integrated programming as Congress intended.[3] As the FCC found as far back as 1994:

> Our experience over the past year suggests that the program access provisions of the statute and our implementing regulations are successfully working to achieve Congress' goal of increasing competition to traditional cable systems by providing greater access by competing multichannel systems to cable programming services.[4]

Today virtually every American household has a choice between two or more competitive packages of video programming at comparable prices from MVPDs other than a cable operator. Moreover, over the course of the program access rules' five-year

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3 See e.g. First Annual Report, 9 FCC Rcd 7442 (1994), ¶231; Second Annual Report, 11 FCC Rcd 2060, 2136 (1995) (program access rules, as enforced by the Commission, successfully promote competition from existing and potential competitors in the video programming distribution market); Third Annual Report, FCC 96-494, rel. Jan. 2, 1997, at ¶152 (noting that 'many parties agree that the program access rules have helped emerging competitors to cable obtain access to programming, although other parties continue to argue that the rules are unnecessary.").

4 Memorandum Opinion and Order on Reconsideration of the First Report and Order, FCC 94-287, 10 FCC Rcd 1902, 1911, ¶18 (1994).

history, only about 31 complaints have been filed.[5] And only two rulings in favor of the complainant have been rendered.

Yet cable's numerous competitors argue that significant impediments remain to obtaining "absolutely essential popular quality programming, particularly sports programming, at nondiscriminatory rates and on nondiscriminatory terms and conditions."[6]

This claim is refuted by the facts.

As NCTA and others demonstrated, the wide availability and wide distribution of cable networks -- both vertically and non-vertically integrated -- on competing MVPDs is indisputable.[7] DirecTV, for example, offers every major, well-established and high penetration national cable network on its 220-channel DBS service, regardless of ownership.[8] DBS, by virtue of its channel capacity and relative freedom from regulatory constraints, offers consumers packages of service that nearly always exceed in number of channels the services available from the incumbent cable operator.[9]

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5 See Appendix A, Status of Program Access Complaints.

6 Comments of Ameritech New Media at 4.

7 See e.g., Comments of NCTA at 12-13.

8 Id. DirecTV is launching new satellites to provide more programming options and Echostar intends to launch satellites to provide local signals in the 20 largest metropolitan markets. See Comments of DirecTV at 10-11; Comments of Echostar at 4.

9 Comments of NCTA at 7-12.

Ameritech's hybrid fiber-coaxial cable system in Columbus, Ohio, for example, includes a full range of established and newer cable networks.[10] Indeed, Ameritech is vigorously challenging incumbent cable operators in the 50 communities in which it has obtained franchises and does not lack for programming to compete effectively in these markets.[11] Ameritech, in fact, claims that it is getting 33% of the market where its service is being offered.[12]

Nevertheless, cable's competitors argue that the confluence of increased consolidation in the cable industry and recent transactions involving cable, broadcast and other companies endanger their access to programming.[13] They argue that in addition to

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10 In addition to local broadcast television stations and PEG access channels, Americast's channel line-up in Columbus, OH includes the following cable networks: Inspirational Network, USA Network, Nickelodeon, QVC, TBS, WGN, Sneak Prevue, The Cartoon Network, The Disney Channel, Lifetime, E!, Comedy Central, VH-1, MTV, SportsChannel, The Golf Channel, The Learning Channel, ESPN, ESPN2, TNT, AMC, Bravo, TV Food Network, HGTV, Turner Classic Movies, The Family Channel, Classic Sports Network, America's Health Network, Sci-Fi Channel, A&E Television Network, The History Channel, FIT, The Discovery Channel, BET on Jazz, CNBC, CNN, Headline News, CNNfn, Court TV, C-SPAN, C-SPAN2, ONN, TNN, BET, Country Music Television, The Travel Channel, The Weather Channel, The Sundance Channel, Cinemax, FLIX, Showtime, Showtime2, The Movie Channel, Encore, Starz!, HBO, HBO2, HBO3 plus 10 channels of pay-per-view. See also CSR-4873-P, Corporate Media Partners d/b/a Americast New Media, Inc. v. Rainbow Programming Holdings, Inc. (answer, filed Jan. 10, 1997) at 8-9 (detailing agreements between SportsChannel and petitioner).

11 In finding that Ameritech provides effective competition in several communities in Michigan and Ohio, the Commission noted that Ameritech provides over 80 channels of programming. Comcast Cablevision of Sterling Heights, 1997 FCC Lexis 2794 (rel. May 28, 1997); Cablevision of the Midwest, Inc. 1997 FCC Lexis 1655 (rel. April 3, 1997); Time Warner, 12 FCC Rcd 3175 (rel. March 13, 1997).

12 Ameritech news release, July 29, 1997.

13 See e.g. Comments of Wireless Cable Association at 2-5, Bell Atlantic/NYNEX, BellSouth at 3 (market conditions *about* to become substantially worse and must be countered with aggressive oversight).

so-called "marquee" networks, they need guaranteed access to all non-vertically integrated and non-satellite delivered programming, including original local news and regional sports.[14]

Although Congress's program access goal has been achieved, some commenters hope they can convince this agency to recommend that Congress expand program access regulation -- not based on any verifiable anticompetitive behavior by the cable industry -- so as to increase their leverage in affiliate negotiations. They would do this by the government taking exclusivity off the bargaining table for any programmer who wants to sell to cable.[15] And they would have the government force cable operators who have invested millions of dollars to develop original programming of local or regional interest to hand over such programming to their competitors. The Commission should reject the proposals of cable competitors to recommend to Congress that it (1) extend the program access rules to entities unaffiliated with cable companies and (2) extend the program access rules to non-satellite delivered, locally-produced programming services.

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14 See, e.g., BellSouth at 10-17; Ameritech at 14-20; DirecTV at 5-7; Wireless Cable Association at 13-14.

15 See Comments of BellSouth at 10-17; Ameritech at 4; Bell Atlantic/NYNEX at 6-7, Wireless Cable Association at 13-14; DirecTV at 5-7. DirecTV also wants to extend vertical limits on cable beyond the year 2002 expiration.

B. The Program Access Rules Should Not be Extended to Non-Vertically Integrated Programmers

The Commission has repeatedly refused to interfere with the affiliation decisions of independent, non-vertically integrated programmers, finding no evidence to warrant government intervention in private negotiations. Only eight months ago, the Commission found that

> The evidence before us . . . is insufficient for us to make any determination concerning the effect, if any, that exclusive arrangements involving non-vertically integrated programmers may have on competition in local markets for the delivery of multichannel video programming.[16]

In enacting program access legislation, Congress aimed to ensure that vertically-integrated cable operators and satellite-delivered programming vendors could not unreasonably deprive competing distribution technologies of national and broad-reaching cable programming services.[17]

In 1992, Congress found that "[v]ertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."[18] Section 628 was

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16 Third Annual Report at ¶157.

17 Section §628(b) of the Act prohibits cable operators and vertically integrated programmers from engaging in "unfair" conduct, "the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."

18 1992 Cable Act, Pub. L. No. 102-385, §2(a)(5),106 Stat. 1460, 1460 (1992). S. Rep. No. 92, 102d Cong., 1st Sess. 27, 28 (1991) (scope of program access rules limited only to vertically integrated systems); H.R. Rep. No. 628, 102d Cong., 2d Sess. 41 (1992) (expressly limits application of the program access rules to vertically integrated programmers).

intended to prevent such programmers from acting on what Congress believed were unique incentives and abilities to favor their commonly-owned cable operators.

As the record shows, there is no evidence to warrant continuation of the program access rules for vertically integrated programmers, and there is certainly nothing to support extension of the rules to non-vertically integrated programmers. The telephone companies and others assert, however, that the rules should be extended to non-vertically integrated companies because increased consolidation in the cable industry means that such companies now have unprecedented incentive to maintain exclusive distribution arrangements with MSOs.[19] Ameritech, for example, claims that a growing number of significant programmers that are not affiliated with cable operators are "tying up quality programming in exclusive contracts."[20] It also asserts that its inability to "acquire substantial amounts of cable programming owned by non-vertically integrated cable programmers pursuant to Section 628 is significant."[21]

The record lacks even faint evidence that non-vertically integrated programmers have routinely failed to provide access to their programming to competing MVPDs on nondiscriminatory terms and conditions. The record also wholly lacks evidence that cable's consolidation and joint venture activity (which pales in contrast to the actions of

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19 Comments of BellSouth at 12 (citing TV Land, Fox News/fx, MSNBC, SportsChannel NY).

20 Comments of Ameritech at 14.

21 Id. at 18.

its competitor's telco parents) is in any way impeding affiliation agreements. While anecdotal assertions have been made about TV Land, for example, the evidence is overwhelming that all of the most widely distributed non-vertically integrated national networks are available to and sold by cable's competitors. Indeed Americast, the telco program consortium, has a major non-vertically integrated "content partner," Disney, which continues to give "its full support" despite recent cutbacks.[22] There have been no claims that any of the top 20 most widely distributed cable networks has been unavailable to any MVPD; and, in fact, all of them are carried by competing MVPDs. To suggest that other unaffiliated program suppliers would not deal with powerful telephone companies is belied by the facts.

It is often in a non-vertically integrated network's economic self interest to enter into agreements with a number of competitive distributors.[23] Broader, rather than narrower, distribution means more per subscriber fees and larger audiences for advertiser-supported networks. As HBO demonstrates, non-cable MVPDs have become an important component of the distribution strategy of vertically-integrated and non-vertically integrated programmers.[24]

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22 "Americast Slimming", *Daily Variety*, July 28, 1997.

23 See Hay, D & D Morris, Industrial Economics and Organization, 1991 (Oxford, UK, Oxford University Press) at 152-162 for a detailed analysis.

24 Comments of HBO at 2-6. As HBO described, five years ago, it had less than 500,000 non-cable subscribers and no high-power DBS subscribers. Today it has approximately 7 million direct-to-home subscribers (both C-band and Ku-band). (HBO notes that for new or low-penetrated basic cable services, non-cable MVPDs have provided a significant boost towards long-term viability. Given the strong performance of non-cable MVPDs, and the importance of these MVPDs to

While broad, non-exclusive distribution is often in a programmer's interest, any given programmer might want to grant exclusive distribution rights to a particular MVPD as part of a legitimate business strategy. As we discuss below, exclusivity is a common and generally accepted business practice to, among other things, promote the supplier's brand or improve its financial returns (as the broadcast networks recognized decades ago). In any event, the networks which cable's competitors complain about -- TV Land, Fox News, MSNBC-- are not exclusive to cable and are available on alternative media. USSB carries TV Land, for example; DirecTV carries Fox News and MSNBC. DirecTV and Echostar also recently added a new service of an unaffiliated programmer, ESPNews, to their channel line-up.[25]

Where program network exclusivity is sought and granted, it does not foreclose entire program markets to others not granted exclusivity. Unless a product is viewed as essential to viable competition, there is no foreclosure of competitors' market opportunities.[26] The inability of an MVPD to purchase a particular cable network does not, in and of itself, harm competition.

HBO's overall business, the company noted that failure to fully utilize non-cable distribution systems would be contrary to its business interests.)

25 "ESPNews joining DirecTV roster", *Hollywood Reporter*, July 30,1997.

26 It should be noted that, even assuming that widely-viewed, non-vertically integrated programming could be viewed as "essential" (which it is not), the telco commenters do not base their complaints on the inability to obtain such programming.

The absence of foreclosure is demonstrated by the non-broadcast viewing share of cable networks which are routinely available to all providers. These networks on average constitute 80% of all basic satellite network prime-time viewing share, and, one must assume, are the most important networks for purposes of local advertising insertions by local MVPDs.[27] These are the same networks generally made available to all MVPDs.

In any event, if real world rather than theoretical problems do develop in particular instances, the FCC already has broad authority to address them -- no further legislation is needed. If, for example, a non-vertically integrated programmer were to enter into exclusive agreements for anticompetitive reasons, the program carriage provisions in Section 616 of the Act broadly regulate the carriage-related behavior of cable operators, with or without an attributable interest in the program supplier, and regardless of the method of distribution.[28] Section 616 specifically prohibits any multichannel video distributor: (1) from requiring a financial interest in a programming service as a condition for carriage; (2) from coercing a programming vendor to provide, or retaliating against such vendor for failing to provide, exclusive rights against other MVPDs as a

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27 Cabletelevision Advertising Bureau, Primetime Viewing Share for July 1997, based on data from A.C. Nielsen Co. The 20 most widely distributed cable networks' combined primetime share equaled 25.03, or 80.4% of the basic cable network primetime share of 31.15.

28 1992 Cable Act §616, 47 U.S.C. §536. Section 628(b) also covers "unfair conduct" of all cable operators, not just vertically integrated cable operators.

condition of carriage; and (3) from discriminating in their carriage decisions against programming vendors in which the MVPD lacks an attributable interest.[29]

These rules implementing section 616 grant standing to competing MVPDs to file complaints where they believe cable operators have coerced programmers, whether vertically-integrated or not, into granting exclusivity to their competitors.[30] This provides an added check on potential anticompetitive behavior by MSOs in the negotiation of carriage agreements.

But under the law, non-vertically integrated cable programming suppliers are free to decide whether and how to deal with prospective buyers. Program affiliation agreements rest on many factors, including price and contract duration, channel capacity, launch and marketing plans, and a host of market forces. The government should not, as cable's competitors would have it, substitute its judgment for the independent program supplier's judgment as to how to exercise its business interests. It is especially troubling that non-cable MVPDs seek one-sided government intervention that would allow only non-cable MVPDs to obtain exclusivity.

In sum, given the well-established policy preference for marketplace solutions, the Commission should decline, as it did in its Second and Third Annual Reports, to

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29 Section 628 allows distributors who allege injury from the actions of vertically integrated programmers to avoid the delay and expense of protracted antitrust litigation and to obtain expedited consideration and relief from the Commission.

30 47 C.F.R. §§76.1300-76.1302.

recommend that Congress intervene in the business relationships of non-vertically integrated programmers. Such action could greatly inhibit the creativity and growth of these networks to the detriment of consumers.

C. Program Access Rules Should Not Be Extended to Local Origination, Non-Satellite Delivered Programming

Cable's competitors also seek to extend the scope of the program access rules to non-satellite-delivered, locally produced programming.[31] They now want the government to force the cable industry to simply hand over local origination programming, including a variety of locally-produced news, information, public affairs and regional sports services created and nurtured by cable operators for the purpose of better serving their customers. As with non-vertically integrated programming, Congress purposefully limited the scope of the program access rules to satellite-delivered services that were arguably vital to the ability of an MVPD to enter the marketplace.[32] As noted above, cable's competitors are providing the nationally-distributed satellite programming that Congress envisioned.

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31 Supra n.14.

32 47 U.S.C. §548(b) ("it shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, . . . to engage in unfair methods of competition . . .the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing *satellite cable programming or satellite broadcast programming* to subscribers or consumers") (emphasis added). See also First Report and Order, 8 FCC Rcd 3359, 3369, ¶28 (1993).

But proposals to force owners of locally-produced, non-satellite delivered program services to sell them without any right to maintain exclusivity would create a further artificial market imbalance.

Local origination programming -- which predates the 1992 Cable Act -- has been a key part of cable's commitment to its local communities. The Cable Act explicitly recognizes the substantial governmental interest in ensuring that cable systems are responsive to the needs and interests of the local communities they serve.[33]

With advancements in headend technology and interconnection, what began as local programming out of single headends has expanded to cover multiple communities. Cable companies are deploying advanced network architectures to interconnect system headends using high capacity fiber optic rings. These architectures allow systems in the same geographical area to share the same headend and production facilities, such as digital video libraries and compression equipment, ad insertion equipment, and computer data servers. These shared facilities also enable cable operators to maximize economies of scale in marketing, promotion, administration and production of programming.

Cable companies regularly share local origination programming among cable systems in their region via fiber. For example, in North Carolina, Time Warner Cable (TWC) produces a half-hour magazine style program that is delivered among systems in the region, which showcases the natural habitat exhibits of the North Carolina Zoo,

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33 Section 601(2), 47 U.S.C. 521(3).

including educational segments for children. In Minneapolis, TWC systems produce a monthly public affairs magazine which is shown live or on tape on multiple cable systems throughout the state.[34] Some of the programming is promoted as cable exclusive.

Since 1981, MediaOne (formerly Continental Cablevision) has provided daily and weekly local news programs to more than 70,000 homes in southeastern Massachusetts. The company also produces daily local news programs in Florida, New York, and California. In Atlanta, Georgia, MediaOne delivers community events programming, sports coverage and local news to more than 500,000 customers in the region via fiber. And throughout Ohio, the company distributes a locally-produced sports and community affairs network.

In southeastern Pennsylvania and parts of New Jersey, Comcast has created a 24-hour local origination network that simulcasts New Jersey's leading morning radio talk show, features sports talk, political and family talk programming, and covers minor league, small college and high school sports that local broadcasters largely ignore. The network serves 1.1 million Comcast customers and is delivered terrestrially via fiber or microwave.

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34 Other examples of programming that is produced by TWC and shared among systems via fiber or microwave include high school sports and a news show in Eastern Pennsylvania; a public affairs show dealing with ethnic and cultural issues, college football and basketball in Indianapolis, Indiana; college basketball in Austin, Texas; horse racing, and high school basketball in Albany, New York.

These examples illustrate the wide range of local original programming distributed terrestrially (and, in many cases, exclusively) on a community or region-wide basis to cable customers. Extending program access rules to terrestrial local origination and regional programming would constitute a major shift in policy beyond the concerns articulated by Congress in the 1992 Act. First, locally-originated programming and other non-satellite-delivered services are not necessary to the competitive viability of any competitor. This fact has been demonstrated by the phenomenal growth in DBS and other national services in the past year alone.

Second, requiring cable operators to turn over the fruits of an often costly and risky venture to a competitor would deny program creators the benefits of their creative labors. If 200 years of U.S. copyright and patent law teach anything, it is that authors and inventors should be rewarded for their creativity, not forced to give up such efforts to any and all competitors. Subjecting local news, sports and other terrestrially-delivered services to the program access provisions would stifle operator incentives to produce such programming. Investments in local news and sports services are costly. News gathering is a labor and equipment intensive enterprise. Sports, too, requires a commitment to production facilities. The public's interest in such programming is part of what the originator has created -- and what competitors wish to tap, by getting the government to tap it for them. By commoditizing locally produced cable programs, the FCC would disserve Section 628's goal of promoting increased diversity in video programming in the public interest.[35]

Cable's competitors have the resources to develop their own similar services without needing the government to tip the scales. Tele-TV, a telco programming venture, reportedly spent $300 to $500 million in programming development.[36] Americast, a joint venture of Ameritech, BellSouth, GTE, SBC Communications and The Walt Disney Company, committed $500 million to its start-up activities.[37] These phone companies, which most vocally demand the right to cable's locally developed programming, can certainly afford to produce local programs or obtain program rights. Their individual company resources are in most cases equivalent to, or greater than, the <u>entire</u> cable industry. Under these circumstances, it would not only be bad public policy -- but it would also be unnecessary public policy -- to require cable networks to relinquish the fruits of their creative efforts to MVPDs fully capable of replicating those efforts. The government should not step into the market and permit them to sponge off the efforts of others.

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35 Section 628(a); 47 U.S.C. §548(a).

36 "Bell Atlantic, NYNEX, PacTel to Close Tele-TV," The Wall Street Journal, December 6, 1996. ("While the original investment was pegged at $300 million split evenly among the three Bells, some executives say actual spending exceeded that handily"); "Bells may shutter Tele-TV," CNNfn, December 6, 1996 ("companies have invested about $500 million over [1995 and 1996].)

37 Ameritech News Release, September 28, 1995. Southern New England Telephone ("SNET") joined the consortium on June 18, 1996. Ameritech News Release, June 19, 1996.

In an attempt to extend program access law that was never intended to reach unique local or regional programming, Ameritech, BellSouth, the Wireless Cable Association and others assert that cable is trying to "evade" the law by the use of terrestrial delivery for local and regional programming.[38] This assertion is simply incorrect. First, the law only covers satellite-delivered programming so in no sense can operators who provide non-satellite delivered programming be said to "evade" the law -- it simply does not apply. Second, to the extent cable's competitive fear satellite-delivered programming will be transferred en masse to terrestrial delivery, that fear is misplaced. There is not one national satellite-delivered cable programming network that has switched to fiber or microwave delivery. And as the Commission found in the 1996 Competition Report, it has seen "no evidence that such strategic conduct has actually occurred".[39] Finally, even were such a switch to occur, it will not be done for anticompetitive reasons. Terrestrial distribution often makes more economic sense than satellite delivery for smaller distribution zones.

The facts bear this out. New England Cable News ("NECN"), a regional news service in which MediaOne has an attributable interest, was moved from satellite to fiber delivery because it is less costly to deliver terrestrially. However, even before the service was moved to fiber and was satellite-delivered, the Commission granted NECN a waiver

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38 See Comments of BellSouth at 15; Comments of Ameritech at 19; Comments of Wireless Cable Association at 11.

39 Third Annual Report at ¶154.

from the program access rules' exclusivity prohibition on the grounds that exclusivity it would attract investment and secure distribution essential to the financial viability of the service and foster diversity in the programming market.[40] In other words, the network did not move to "evade" the law; it had been granted a waiver as a satellite network and did not need to change its mode of delivery for that reason at all.

As the Commission acknowledges, improved technology and lower costs may make terrestrial distribution of programming more efficient and cost-effective than distribution via satellite. But there is absolutely no evidence that program networks subject to the program access rules have switched to fiber optic distribution for anticompetitive reasons or for the purpose of avoiding the Act's requirements. And if there were evidence of such activity of the law by a particular company, the Commission has authority to address it on a case-by-case basis.

D. There Are Legitimate, Pro-Competitive Reasons For Exclusive Program Distribution Arrangements

Cable's competitors decry exclusive programming contracts in a noncompetitive market as the "enemy" of competition."[41] But competition is occurring and alternative MVPDs are increasing their share of subscribers in many markets -- a trend identified by the Commission in its 1996 Competition Report.[42] And as Congress and the Commission

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40 New England Cable News, 9 FCC Rcd 3231, 3238 (1994) ("NECN Order").

41 Comments of Ameritech at 4.

42 One of the striking patterns in the comments of cable's competitors is that each industry suggests that it is offering a competitive alternative to cable, while belittling the role of other competitors

have recognized, exclusivity in areas served by cable "may provide countervailing benefits to the programming market or to the development of competition among distributors."[43] Indeed, such practice is more often than not wholly legitimate and promotes rather than inhibits competition.

Congress, in Section 628, instructed the Commission to balance the benefits of exclusivity to incent investment in and distribution of diverse programming services against access requirements to foster competition in the video distribution marketplace with respect to vertically-integrated, satellite-delivered programmers. While exclusive contracts may sometimes constitute anticompetitive conduct, Section 628 identifies several potentially pro-competitive effects of such agreements and authorizes the Commission to permit them where it finds that they are "in the public interest."[44] As

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in the marketplace. See Ameritech New Media at 2; BellSouth at 6-7; ICTA at 5; OpTel at 2. This only underscores the importance of the Commission's comprehensive evaluation of the state of competition. The collective evidence, as set forth in NCTA's comments, demonstrates that cable faces growing competition and subscriber loss to each of the alternative video providers.

43 NECN Order 9 FCC Rcd 3231. Development of Competition and Diversity in Video Programming Distribution and Carriage, First Report and Order, at ¶63 ("As a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized."); Congressional Record, July 23, 1992 at 6534 (Statement of Representative Tauzin) ("[E]xclusive programming that is not designed to kill the competition is still permitted.").

44 In 1990, the Commission discussed the delicate balance between pro-competitive exclusivity practices and promoting entry by new competitors: "While we agree with cable commenters that the Commission should and does generally support exclusivity rights, we believe that the public interest in developing competition to the local cable operator justifies temporary, limited and targeted intervention to ensure that alternative multichannel program providers have fair and equitable access to programming." 1990 Cable Report, 5 FCC Rcd at 5031 (emphasis added).

noted above with respect to NECN, the Commission found that the public interest benefits of exclusivity outweighed the rule disfavoring exclusivity under Section 628.

It is also important to note that Congress recognized a significant difference between satellite and non-satellite programming in the 1992 Cable Act. With regard to satellite programming which was widely distributed on a national basis, Congress presumed that exclusivity was generally not in the public interest, but provided a mechanism to petition for exclusivity on a case-by-case basis as to whether such exclusivity served the public interest.

But by not requiring access to non-satellite-delivered programming, Congress built in a presumption that exclusivity in such programming serves the public interest. It understood that such programming, if not available exclusively to cable operators, would not be created by cable operators, leading to a decrease in consumer welfare. It also understood that cable operators were creating local programming-- especially news and public affairs programming that would provide great consumer benefits; and that other MVPDs would not be competitively harmed by not having access to such programming. Indeed, it is likely Congress presumed these MVPDs would benefit from creating their own local programming for their customers. In sum, Congress understood that exclusivity for local, cable operator-created programming was competitively good. And nothing has called that understanding into question.

In determining that NECN was different from other programming services in light of the "regional nature of its programming and audience appeal," the Commission